IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 467.

IN THE MATTER OF V-I-D, INC., DEBTOR.

KELLEY, GLOVER & VALE, INCORPORATED, TRUSTEE,
Petitioner,

vs.

CHARLES J. KRAMER AND HELEN E. KRAMER AND PETER EVANS, SUCCESSOR INDENTURE TRUSTEE,
Respondents.

RESPONDENTS' BRIEF.

ADDITIONAL STATEMENT OF FACTS.

Respondents, by way of correction of petitioner's statement of facts, and additional thereto, say: In an attempt to confuse the issues Attorney Darlington introduced in evidence, over respondents' objection, a quit claim deed from Glover & Glover to Kelley, Glover and Vale, Incorporated, Trustee, to the real estate involved (Tr. 77). The United States Court of Appeals held heretofore in a prior appeal in this case that said Glovers had no interest in the real estate (158 F. 2d 964), and this Court denied certiorari, 331 U. S. 829 (1947). See also 177 F. 2d 234 (1949), cert. denied 339 U. S. 904 (1950).

The record (Tr. 93) shows respondent Peter L. Evans was named as Successor Trustee under the mortgage indenture, and the District Court authorized and directed him to act and take part in these reorganization proceedings. This order is still in force and binding upon petitioner (Tr. 93).

The first mortgage indenture itself provides for the securing of the indebtedness and bonds (Tr. 80). It further provides that in case of failure to pay any bond when due, at the option of the legal holder, or holders, of said bond, or any of them, the whole issue may be declared due and payable at once and the legal holder, or holders, of said bond, or any of them, or the trustees for the benefit of the legal holders, have the right to foreclose the trust deed (Tr. 83). It also provides (Tr. 85):

> "Each and every estate, right, title, interest, lien, claim, demand and cause of action expressed or intended by this indenture to be vested in or conveyed to the trustees shall (whether or not the same shall be lawfully conveyed to or vested in the Home Bank and Trust Company and its successors in trust hereunder) in any event hereby vest in and be conveyed to Lawrence H. Prybylski and his successors in trust hereunder, and each and every covenant or obligation expressed or intended by this indenture to run in favor of, and each and every right, power, remedy and duty expressed or intended by this indenture to be conferred upon or be enforcible by the Trustee shall (*whether or not the same shall lawfully run in favor of or be conferred upon or be enforcible by the Home Bank and Trust Company or its successors in trust hereunder*) in any event run in favor of, be conferred upon and enforcible by Lawrence H. Prybylski and his successors in trust hereunder with like effect, in each and every such case, as though this indenture were originally entered into between the party of the first part and the said *Lawrence H. Prybylski, as sole Trustee.*"

The Home Bank and Trust Company never acted in its individual capacity, but only as an inactive trustee; and the situs of this loan was Chicago, Illinois (Tr. 51, 52, 53). The bonds were sold in Chicago where they were legal, and the loan was paid out in Chicago (Tr. 54-55). The Home Bank and Trust Company is not before this Court, either individually or as Trustee. It is not claiming anything, but negotiated the loan solely as a broker, and the record shows it owned no bonds. The First Mortgage bonds were bearer bonds and negotiable commercial paper, and sold for value before maturity to third parties, in due course, from whom respondents Charles J. Kramer and Helen E. Kramer purchased the bonds they hold (Tr. 23, 55, 76). The first mortgage and bonds were not dead as stated by the petitioners.

The Home Bank and Trust Company was not the mortgagee, as alleged by petitioner, but merely co-trustee in the mortgage.

The judgment of foreclosure upon which petitioner seeks to rely was on a second mortgage which specifically provided that said mortgage was subject to and junior to the respondents' first mortgage (Tr. 9).

CONTESTED ISSUES.

The District Court and the Court of Appeals both decided the issues that respondents had a good and valid first lien on the real estate according to the facts and law pertaining thereto, and any other decisions would have been contrary to law. Such decisions did not conflict with any other decisions of the United States District Court, the United States Court of Appeals, or the United States Supreme Court, but both decisions followed the Indiana law, and all Federal laws and court decisions, and there is no conflict therein whatsoever.

PROPOSITIONS OF LAW.

I.

A. Respondents' rights are clearly enforceable under Indiana law. First, the trust indenture itself cures any defect which might have been caused by the Home Bank and Trust Company acting as co-trustee. Second, neither original trustee is now before the court, so that the question of their capacity to sue is not presented here. Respondent Evans was authorized and directed by the District Court, on an order not here appealed from, to take part in this reorganization case as present first mortgage indenture trustee to represent bondholders against whom no charge of wrongdoing is being or could be made. Respondents Kramers are specifically authorized under the indenture to sue in their own behalf as bondholders.

Peters, etc. v. *Carper,* 172 N. E. 319 (Ind. App. 1930).

Humphreys v. *City National Bank,* 190 Ind. 293, 130 N. E. 273 (1921).

B. The case of *Woods* v. *Interstate Realty Co.,* 337 U. S. 535 (1949), is inapplicable here because this is not a diversity case. Even if that decision did apply it would result in this Court's following Indiana law, which has already been shown above to support respondents' position. All the cases cited by petitioner support respondents' contentions.

Prudence Realization Corp. v. *Geist,* 316 U. S. 89, 95 (1942).

Vanston, etc. v. *Greene,* 329 U. S. 156.

II.

The Indiana Statute concerning foreign trustees has been held unconstitutional under facts such as shown in this case before the Court.

Kist, et al. v. *Coughlin, et al.*, 50 N. E. 2d 939 (Ind. App. 1943), transferred 57 N. E. 2d 199 (Ind. 1944).

Johnson v. *State, et al.*, 8 N. E. 2d 590 (Ind. 1937).

Robey v. *Smith, et al.*, 30 N. E. 1093 (Ind. 1892).

III.

The cases of *Barnett* v. *Central Republic Bank and Trust Co.* and *Burroughs* v. *Southern Colonization Co. etc.*, cited by petitioner, are not in point, for in those cases the non-qualifying corporations or their successors in interest were creditors suing in their own interest. In the case at bar the respondent bondholders, are the creditors, innocent purchasers of commercial paper for value, and therefore are not chargeable with infirmities. They have the right to foreclose under the specific terms of the bonds and mortgage.

IV.

The Supreme Court will not take on certiorari cases fully heard and adjudicated below for the mere purpose of examining the result.

Deputy v. *duPont*, 308 U. S. 488, 60 S. Ct. 363 (dissenting opinion of Mr. Justice Roberts).

Magnum Import Co. v. *Houbigant, Inc.*, 262 U. S. 159, 43 S. Ct. 531.

ARGUMENT.

I.

Petitioner's contention that the trust indenture is invalid and unenforcible is not supported by Indiana Statutes, by State or Federal court decisions, or by common sense. The indenture vested all the trustee's rights and powers so as to "run in favor of, be conferred upon and be enforcible by Lawrence H. Prybylski and his successors in trust hereunder with like effect, in each and every such case, as though this indenture were originally entered into between the party of the first part and the said Lawrence H. Prybylski as sole Trustee" (Tr. 85). Thus the Statute relied on by petitioner, since it applies only to suits by foreign corporations, is wholly without force in this case.

The Home Bank and Trust Company had no interest whatever in the property individually. This was not an active trust, and the Home Bank and Trust Company does not own any of these bonds; neither does any assignee or successor thereof. All of the cases indicate and hold that the bonds are valid and enforcible without any infirmities. That being so the question of whether the said Bank was doing business in Indiana has no bearing, standing or consideration in determining the matters before the Court.

The Home Bank and Trust Company and Prybylski, former co-trustees for the bondholders, are no longer in existence, and are not before the Court. They are not claiming anything. The bondholders who have bonds that are valid, are proceeding under their mortgage, as the mortgage provides, to collect their indebtedness through enforcement of the trust deed which gives them the right to sue without any action by the named trustees

As for *Woods* v. *Interstate Realty Company*, 337 U. S. 535 (1949), relied on so heavily by petitioner, it should first be emphasized that its doctrine is applicable solely to diversity cases. Throughout the opinion it was made clear that it was for purposes of diversity jurisdiction that the Federal court is "in effect, only another court of the State". *Erie* v. *Tompkins* and its progeny are not controlling where the Federal court, as here, is a bankruptcy court. *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 95 (1942).

But even more significant is the fact that all the *Woods* case would require, even if applicable, would be for the court to apply Indiana law, which permits a foreclosure of the first mortgage in the Indiana state courts.

> *Peter and Burghard Stone Co.* v. *Carper*, 96 Ind. App. 554 (Ind. App. 1930).

Thus both the *Woods* case and the *Peter* case, and all other cases cited by petitioner militate against the petitioner's claim in this case, and sustain the contention of the respondents that the bonds are valid, that the indenture is valid, and that the bondholders could sue in either the state courts or the federal courts.

II.

It is the law that no action will fail or fall because of an invalid trustee, or no trustee, for the court can, and upon request by interested parties usually does, appoint a trustee. Burns' Ind. Statutes (1951), Sec. 56-619. Nowhere in the law do you find a cause of action held invalid and unenforcible because of a non-resident trustee where the party beneficially interested has done no wrong and the debt is not invalid for some legal reason.

Petitioner further asserts that two of the trustees named were officers of the bank. That fact can have no bearing on

this case. None of the trustees, including the bank, ever claimed anything under the bearer bonds, or anything under the trust deed, other than as co-trustees, who were wholly inactive titleholders.

III.

The decisions of the District Court and the Court of Appeals are supported by all the evidence in the case, and by the applicable law; and any other decision would have been contrary to both the evidence and the law. The holders and owners of the bonds are authorized by the trust deed to foreclose in their own names, and as the Home Bank and Trust Company, and Prybylski, as trustees, are not involved here, there is no legal reason why the bondholders cannot proceed to collect their just claims. Nor is Peter Evans in any way precluded from maintaining the validity of the bonds as Successor Trustee for bondholders other than the Kramers.

IV.

The Supreme Court will not take, on certiorari, cases fully heard and adjudicated below for the mere purpose of examining the result.

Petitioner, in its brief, fails to set forth any reasons for the granting of the writ sought, other than a dissatisfaction with the manner in which the District Court and Court of Appeals determined the question below, and complaint as to certain language used in the opinion by the Court of Appeals.

This Court will exercise its power of certiorari sparingly and with caution and issue its writ only in matters of great public interest. Its position was well stated by Mr. Chief Justice Taft in *Magnum Import Company* v. *Houbigant, Inc.*, 262 U. S. 159; 67 Law Ed. 922, 43 Sup. Ct. 531:

"The question how the Court should exercise this

power (to issue writ of certiorari) next arises. The jurisdiction to bring up cases by certiorari from the Circuit Court of Appeals was given for two purposes: First, to secure uniformity of decision between those courts in the nine circuits; and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort. The jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another hearing."

And further, as said by Mr. Justice Roberts in *Deputy* v. *duPont*, 308 U. S. 488, 84 L. Ed. 416, 60 S. Ct. 363:

> "The function of this court is to resolve conflicts of decision and to settle important principles of law. The discretionary power of this court to review judgments of lower Federal Courts was not intended to be exercised in every case where these courts had adjudicated the conflicting claims of the parties, which involves no important principle of law and no conflict of decision amongst the Federal Courts. * * * we will not take cases fully heard and adjudicated below for the mere purpose of re-examining the correctness of the result."

CONCLUSION.

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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